NO. 48796-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

QIUORADAI TAYLOR and DUPREA WILSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 14-1-04698-9 and 14-1-04668-7

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion when it declined to instruct the jury regarding duty of care, where no such instruction is required by law?

2. Whether the State adduced sufficient evidence to prove all elements of assault in the first degree, beyond a reasonable doubt?

3. Whether the State adduced sufficient evidence to prove that the defendants, or an accomplice, were armed with a firearm to the manslaughter charge?

4. Whether the crimes were the "same criminal conduct" for calculating the offender score?

5. Whether any of the crimes merged at sentencing?

6. If the State prevails on appeal, should the Court impose appellate costs where the defendants were sentenced to over 50 years in prison and also found to be indigent?

B. STATEMENT OF THE CASE.

1. Procedure

November 24, 2014, the Pierce County Prosecuting Attorney (State) charged Qiuoradai Taylor and DuPrea Wilson, the defendants, with manslaughter in the first degree, two counts of assault in the first degree,

two counts of robbery in the second degree, two counts of kidnapping in the first degree, one count of burglary in the first degree, and two counts of assault in the second degree. CP 1-6, 885-891. All counts included a firearm sentencing enhancement (FASE). *Id.* As the case proceeded to trial, the State filed an amended Information adding a sentencing aggravating factor that defendant Taylor committed counts I-III shortly after being released from incarceration. RCW 9.94A.535(3)(t). CP 414-415.

The case was assigned to the Hon. Kitty-Ann van Doorninck for trial. 1 RP. After hearing all the evidence, the jury found the defendants guilty, as charged. CP 830-831, 1267-1268. The jury also found all of the firearm and weapon sentencing enhancements. *Id.* The court ordered a mitigated sentence below the standard range; zero months on counts II-XI. CP 833, 1273. Even with zero months on the underlying sentences, the manslaughter sentence and mandatory firearm and weapon enhancements resulted in lengthy sentences for both defendants; 55.5 years. CP 836, 1273. Both defendants filed timely notices of appeal. CP 854, 1281.

2. Facts

It was the wrong house, but they decided to terrorize the occupants nonetheless. The evening of November 18, 2014, Taijon Voorhees, DuPrea Wilson, and Qiuoradai Taylor went to a house in a residential neighborhood at 11015 Briar Rd. S.W. in Lakewood, Washington. They

were dressed in dark clothing and carried weapons. 3 RP 205, 4 RP 280, 5 RP 471. All wore a ski masks or bandannas to cover their faces, and all wore latex gloves in order to prevent identification. 3 RP 206, 222, 284. The plan was to do an invasion robbery of a marijuana dispensary. 5 RP 488.

The residents of the home were a couple in their mid-60's. 3 RP 238. The couple were preparing to retire for the night; the female resident was taking a bath. 3 RP 277. The male resident responded to knock at the door. When he opened the door, three masked invaders forced their way in. 3 RP 205. One of them pistol-whipped the male resident and forced him to the floor, face-down. 3 RP 207. The invaders demanded "weed," gold, and money. *Id.*

The male resident was confused by this, in that he and his wife had no gold, very little money, and certainly no "weed." 3 RP 207. Dissatisfied with this answer, one of the invaders threatened to "cap," or shoot, the man. *Id.* Apparently realizing that the invaders had the wrong place, one of the invaders told the others to grab the television, and to find and get the female resident. 3 RP 208. Meanwhile, one of the invaders held a revolver to the head of the male resident. 3 RP 210.

The female resident heard the commotion at the front door and in the other room. 4 RP 278. She locked the bathroom door and started to dress. 4 RP 279. A masked man carrying a large knife kicked in the bathroom door. 4 RP 280. The man tried to stab her, but she blocked the

strike, resulting in a cut to her hand. 4 RP 281. The man punched her in the face and dragged her to the living room. 4 RP 282. There, another masked man pointed a gun at her, demanding "weed," gold, and money. 4 RP 285.

The invaders took the woman's wedding ring and cell phone. 4 RP 288, 292. They took the man's wallet and keys. 3 RP 219. The invaders had the woman get on the floor, face-down, and tied the residents up with electrical cords. 3 RP 213, 4 RP 290, 292. The invaders then ransacked the house. 3 RP 214. After this, the invaders then left through the front door. *Id.*

The residents got up, locked the door, and called 911. 3 RP 214, 216. The residents immediately heard the invaders pounding on the front door. 3 RP 216. Then, the residents heard a gunshot right outside the door. *Id.* The residents retreated to their bedroom and locked the door. *Id.*

The male resident armed himself with a pistol. 3 RP 216. The residents took cover behind the bed. *Id.*, 4 RP 295. The invaders re-entered the house and came straight to the bedroom door. 3 RP 220. The male resident warned them that he had a gun. 3 RP 221, 5 RP 490. The invaders kicked open the bedroom door and entered. *Id.*, 4 RP 297. The male resident fired twice. *Id.* Meeting active armed resistance, the invaders fled. 3 RP 222.

The shots fired struck the masked invader who was first through the bedroom door. 3 RP 222, 5 RP 490. The man hit by the gunfire was

Taijon Voorhees. 5 RP 490. After fleeing the residence the defendants and Voorhees got in their vehicle and drove off. *Id.* Voorhees told the defendants that he was hurt. *Id.*

Voorhees pleaded with the defendants to get him medical help. 5 RP 491. The defendants would not, fearing that authorities would question them about how Voorhees got shot. *Id.* So, the defendants decided to drop Voorhees in the parking lot of an apartment complex in Federal Way. *Id.*

After dropping Voorhees in the apartment complex parking lot, the defendants drove to another apartment complex two miles away. 6 RP 626. There, defendant Wilson went to an apartment and borrowed the resident's phone to call 911. 5 RP 513, 6 RP 657, 659. Defendant Wilson identified himself to the 911 center as "Frank Smith." 5 RP 457, 513.

Police responded to the call. The first officers there found Voorhees laying by the curb in the parking lot. 6 RP 607. The officer began CPR and continued until medical aid arrived. 6 RP 609. The medics were unsuccessful in their efforts to save Voorhees. 6 RP 613. Voorhees died of massive blood loss as a result of a gunshot wound to the thigh, which severed his femoral artery. 5 RP 542.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING MANSLAUGHTER.

Generally, a trial court's choice of jury instructions is reviewed for an abuse of discretion. *See* ***State v. Fleming***, 155 Wn. App. 489, 503, 228 P.3d 804 (2010). Statements of the law in jury instructions are reviewed *de novo*. *See* ***State v. Willis***, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Jury instructions are sufficient if they permit the parties to argue their respective theories of the case, are not misleading, and properly inform the jury how to apply the law, when read as a whole. ***State v. Barnes***, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); ***State v. Winings***, 126 Wn. App. 75, 86, 107 P.3d 141 (2005).

A person commits manslaughter in the first degree when "He or she recklessly causes the death of another person." RCW 9A32.060(1)(a). The trial court correctly instructed the jury that:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a death may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Instruction 10, CP 661. Most of this language comes directly from RCW 9A.08.010(1)(c). The application to manslaughter is a correct statement of the law. *See* ***State v. Gamble***, 154 Wash.2d 457, 467, 114 P. 3d 646 (2005). The trial court further correctly instructed the jury that the State

had the burden to prove that the defendants' acts or omissions were the proximate cause of Voorhees' death. *See* Instruction 13, CP 664.

At trial and on appeal, the defendants argued that the court was required to instruct the jury that the State was required to prove that the defendants had, and disregarded, a duty of care to Voorhees. This is not the law.

Arguably, both manslaughter in the first and second degrees imply a general duty. For manslaughter in the first degree, it is a duty to "know of ... a substantial risk that a death may occur" and comply with "conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c). Manslaughter in the second degree requires a duty to "be aware." RCW 9A.08.010(1)(d). It also implies a duty to comply with a "standard of care." The crime is in death caused by the "know and disregard" or "fail to be aware" of that duty through "gross deviation." *See* RCW 9A.32.060 and .070.

The principle of "duty of care" or "standard of care," and whether it has been breached, is the subject of many civil lawsuits. *See e.g.* ***Fergen v. Sestero***, 182 Wn.2d 794, 804, 346 P. 3d 708 (2015)(medical malpractice case involving exercise of professional judgment). Jury instructions in such cases are hotly litigated and often the subject of appeal. *Id.*

Criminal law does impose a specific duty of care on persons in a position of trust or responsibility. *See e.g.* ***State v. Morgan***, 86 Wn. App.

74, 936 P. 2d 20 (1997)(husband's duty to wife); ***State v. Norman***, 61 Wn. App. 16, 808 P.2d 1159 (1991)(parents' duty to child). Despite the fact that the words "standard of care" are used to define criminal negligence, a separate instruction regarding "standard of care" is generally not given in a criminal case. *See gen.* WPIC 10.04 and comments. The Supreme Court has recognized that "criminal law and tort law serve different purposes and therefore have different principles of legal causation." ***State v. Bauer***, 180 Wn.2d 929, 936, 329 P. 3d (2014). Although the defendants in this case requested, and the court gave, instructions on manslaughter in the second degree, even the defendants did not find it necessary to propose a definition of "standard of care."

The instructions regarding manslaughter in this case were correct statements of the law, and not misleading. When read as a whole, the instructions permitted the parties to argue their respective theories of the case.

Wilson's theory[1] of the case was, first, proximate cause; that Voorhees caused his own death by kicking in the bedroom door, resulting in, or "causing," the male resident to shoot him. 10 RP 1175-1176. Counsel argued that there was no proof that Wilson was even in the house when Voorhees was shot. 10 RP 1176. Counsel also argued causality by

[1] The defendants' respective theories of the case are taken from closing argument. Wilson reserved opening. 3 RP 98. Taylor gave an opening statement, but it was not transcribed. *Id.*

pointing out that Voorhees bled to death rapidly because his femoral artery had been transected. 10 RP 1176-1177. Further, counsel argued that there was no evidence that Wilson decided not to take Voorhees to the hospital. 10 RP 1177.

Taylor's overall theme differed from Wilson's: it was not him; the State never proved that Taylor was even present at the scene and participated in the crimes. 10 RP 1198, 1199, 1203. Otherwise, his theory of the case was similar to Wilson: Taylor did not cause Voorhees death, and there was no evidence that Taylor accompanied him into the house when he was shot. 10 RP 1192. Also, counsel argued that there was no evidence that Taylor decided or participated in the decision not to take Voorhees to the hospital. 10 RP 1194. Counsel posed that perhaps Voorhees did not want to go to the hospital. 10 RP 1193. Taylor's counsel took it upon himself to instruct the jury that Taylor had no duty to aid the bleeding man; that Taylor was only responsible if he caused Voorhees' death. 10 RP 1194. Counsel did not even discuss negligent manslaughter; only to repeat that there was no evidence that Taylor caused Voorhees' death. 10 RP 1195.

While it might not be error to instruct the jury regarding duty in an appropriate manslaughter case, the law does not require it. Here, an instruction on duty made no difference to Taylor, who argued that he was not even there. Wilson had an effective causation argument; that he had nothing to do with the fact that someone else shot Voorhees and he bled to

death in minutes. The trial court did not abuse its discretion in denying the defendants' proposed instruction regarding duty.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL THE ELEMENTS OF ASSAULT IN THE FIRST DEGREE.

In a challenge to the sufficiency of the evidence, the appellate court determines whether any rational fact finder could have found the essential elements of the charged crime beyond a reasonable doubt, viewing the trial evidence in the light most favorable to the State. ***State v. Brockob***, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). An insufficiency claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *see also* ***State v. Kintz***, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). Direct and circumstantial evidence are equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. ***Thomas***, at 874-875; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The presence of contrary or countervailing evidence is irrelevant to a sufficiency-of-the-evidence challenge because the evidence is viewed in the light most favorable to the State. ***State v. Ibarra–Cisneros***, 172 Wn.2d 880, 896, 263 P.3d 591 (2011).

The defendants were charged with two counts of assault in the first degree; "with intent to inflict great bodily harm, intentionally assault [victims] with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death." CP 415; *see* RCW 9A.36.011(1)(a). The defendants argue that the State failed to prove intent to cause great bodily harm. Taylor Br. at 14.

When the invaders had the victims at gunpoint on the floor, one of the invaders said of the female victim: "just shoot her in the head now." 3 RP 214, 4 RP 293. Another said "not yet." *Id.* After the invaders left briefly, the male victim got off the floor and closed the door. 3 RP 214. One of the invaders tried to force the door open. 3 RP 216, 4 RP 295. When unsuccessful, one of them fired a shot into the door. *Id.*, 4 RP 377-378. The victims retreated to the bedroom, where they locked the door. 3 RP 216, 4 RP 296. The victims were sure that the invaders' intent was now to kill them. 3 RP 220. The invaders forced open the front door and advanced immediately to the bedroom door. 3 RP 220, 4 RP 297.The invaders kicked in the locked bedroom door and advanced on the victims. 3 RP 221, 4 RP 297.

When the invaders first entered the house, one of them kicked in the bathroom door, where the female victim was taking a bath. 4 RP 280. He was armed with a knife. 4 RP 281. He injured her with it when he tried to stab her and she blocked his thrust. 4 RP 281.

By challenging the sufficiency of the evidence, the defendant admits all of the above is true. They agree that all of the logical inferences are drawn against them. The jury could conclude the intent of the defendants from the defendants' own words and actions. The jury could conclude that the defendants shot at the door, believing the victims were in the room on the other side, where the defendants had left them. The jury could conclude that the shot was intended for the victims. Therefore, the jury had sufficient evidence to find all of the elements of assault in the first degree, beyond a reasonable doubt.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE FIREARM SENTENCING ENHANCEMENT REGARDING MANSLAUGHTER.

Here, the jury was correctly instructed that "A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use." Instruction 79, CP 735. *See* WPIC 2.10.01; ***State v. Schelin***, 147 Wn.2d 562, 567, 55 P.3d 632 (2002); ***State v. Valdobinos***, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). Instruction 79 also told the jury that the State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant and between the firearm and the crime. CP 735. The jury was allowed to consider, among other factors, "the nature of the crime and the circumstances surrounding the commission of the crime,

including the location of the weapon at the time of the crime and the type of weapon." *Id.*

Voorhees had the gun at one point. He fired a round into the door. 5 RP 490. When the defendants and Voorhees fled the victims' home, the defendants and Voorhees still had the gun. The gun was not left at the victims' home.

The defendants drove around with Voorhees in the car. They drove from the victims' home in Lakewood to Federal Way. The defendants were so concerned about being discovered that they dumped Voorhees in an apartment complex parking lot instead of at a hospital.

From the evidence, the jury knew that the defendants and Voorhees had a gun. The defendants or their accomplice, Voorhees, used it on two senior citizens during the home invasion. The defendants preferred to let their own friend and accomplice bleed to death rather risk capture. From this, the jury could conclude that the defendants were willing to use the gun to protect their get -away or shield themselves from capture. The defendants were armed while Voorhees was bleeding to death as they drove around; the manslaughter. The State proved the nexus of the gun to the defendants, and the gun to the crime.

4. THE CRIMES WERE NOT THE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589(1)(a), offenses that constitute the same criminal conduct are treated as one crime for sentencing purposes.

Offenses are the same criminal conduct if they require "the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Courts "generally construe these requirements narrowly 'to disallow most claims that multiple offenses constitute the same criminal act.'" ***State v. Davis***, 174 Wn. App. 623, 641, 300 P.3d 465 (2013) (quoting ***State v. Porter***, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). The defendant bears the burden of proving offenses encompass the same criminal conduct. ***State v. Graciano***, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

The defendant's claim that burglary, robbery, and kidnapping involve the same criminal conduct is foreclosed by ***State v. Brett***, 126 Wn.2d 136, 170-71, 892 P.2d 29 (1995). In that aggravated murder prosecution, Brett "argue[d] allowing the jury to find him guilty of multiple aggravating circumstances arising out of the same conduct violates the 'same criminal conduct' rule . . . ." *Id.* at 170. The Court rejected the argument, first on the basis that the same criminal conduct provision of the SRA did not apply to aggravating factors. *Id.* The Court also made clear however that the argument would fail even if aggravating factors were subject to the same criminal conduct provision of the SRA:

> [B]urglary, robbery, kidnapping, and concealment do not require the same objective criminal intent. See [State v. Dunaway, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987)] (intent behind robbery distinct from intent behind attempted murder); State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992) ("burglary and kidnapping are not the

> same criminal conduct because the intent was not the same for both crimes."). In addition, there were multiple victims of the robbery, kidnapping, and burglary aggravators: [a husband and wife]. Multiple crimes against multiple victims are not considered to be the same criminal conduct.

Brett, 126 Wn.2d at 170-71. Furthermore, even where the court treats multiple counts as the same criminal conduct, if those counts include firearm or deadly-weapon sentencing enhancements, all enhancements must be imposed. ***State v. Mandanas***, 168 Wn.2d 84, 228 P.3d 13 (2010).

The trial court properly found that, under the facts of this case, and the applicable law, the crimes were not the same criminal conduct. The offender score was calculated correctly. There was no error.

5. CRIMES DID NOT MERGE AT SENTENCING.

"'Merger' is a 'doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions,'" which was developed by the judiciary "as an extension of double jeopardy principles." ***State v. Berg***, 181 Wn.2d 857, 864, 337 P.3d 310 (2014), quoting ***State v. Vladovic***, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). "The state and federal double jeopardy clauses provide the same protections." ***State v. Knight***, 176 Wn. App. 936, 951, 309 P.3d 776, 785 (2013), *review denied*, 179 Wn.2d 1021 (2014). When addressing merger, the court will "consider the elements of the crimes as charged and proved,

not merely at the level of an abstract articulation of the elements." ***Knight***, 176 Wn. App. at 952.

If there are multiple acts that could constitute second degree assault, the merger doctrine does not apply if an act of second degree assault was "not necessary" to elevate the degree of robbery. ***Knight***, 176 Wn. App. at 953. In ***Knight***, the defendant was convicted of several crimes arising out of her participation in a violent home invasion robbery. *Id.* at 940-44. During the robbery, one of the participants brandished a handgun at the victims, and their hands were "zip tied" behind their backs and the victim's wedding rings were taken from them. *Id.* at 942. The defendant's co-participants then began to steal items from throughout the house while the victims were forced to lie down on the floor. *Id.* Later, while the victims were restrained on the floor, one of the robbers held a gun to the head of one of the victims and demanded to know the location of a safe and kicked and threatened the victim when she said they did not own a safe. *Id.* at 943.

The court rejected the defendant's argument that the assault in the second degree merged into the robbery in the first degree of the same victim. *Id.* at 956. The court indicated the defendant's "merger argument would be compelling if the second degree assault of [the victim] could have only involved [the co-defendant] pointing [the defendant's] gun at [the victim] when they robbed [the victim] of her wedding ring at the beginning of the home invasion," but since "[the co-defendant's] pointing

his gun at [the victim] and kicking her in the head to force her to reveal the location of a safe provided an 'independent purpose' and support for a separate conviction for this later second degree assault" the robbery was elevated to first degree by a separate, independent assault and thus the convictions did not merge. *Id.* The ***Knight*** court also rejected arguments that the crimes constituted same criminal conduct as well. *Id* at 961-62.

In this case, the State conceded that count IX (assault 2 with a firearm against the male victim) merges into count IV (robbery in the first degree against the male victim), and that count X (assault 2 with a firearm against the female victim) merges into count V (robbery in the first degree against the female victim). However, as in ***Knight***, in count XI (assault in the second degree with a knife against the female victim) the defendants committed an act of assault in the second degree that did not elevate the robbery to first degree and thus does not merge. The specific act underlying count XI occurred when one of the invaders forced his way into the bathroom where the female victim was barricaded and assaulted her with the knife before the robbery, causing a large cut on her hand. She was then dragged out of the bathroom and brought to the living room where her husband was prone on the floor. Once she was in the living room a different invader brandished the gun at her and began to demand "weed," gold, and money; this is when the robbery of the female victim in count V began. As in ***Knight***, the assault in the second degree in count XI

was complete before the robbery even began, and thus it cannot merge because it was "independent" in "purpose or effect."

For the crime of burglary, the Legislature clearly manifested in the "anti-merger statute" its preference that a defendant be punished separately for all the crimes he or she commits during the burglary: "[e]very person who, in the commission of a burglary shall commit any other crime, may be punished therefor as well as for the burglary, and may be prosecuted for each crime separately." RCW 9A.52.050; *see also* ***State v. Davison***, 56 Wn. App. 554, 562, 784 P.2d 1268, 1273 (1990).

The anti-merger statute also applies to prevent merger of counts into burglary even if the counts were merged for the purposes of scoring on themselves. ***State v. Tili***, 139 Wn.2d 107, 126, 985 P.2d 365, 376 (1999), appealed on other grounds after new sentencing, 148 Wn.2d 350 (2003). In ***Tili***, the State conceded the defendant's assault in the second degree merged into his rape in the first degree conviction but argued "'when sentencing on the burglary, both the assault and the rape may be separately punished because of the burglary antimerger statute.'" *Id.* at 125. The Court agreed and held "the assault may be used in calculating the offender score for the burglary conviction only, and not for the rape charges." *Id.*

In this case, even though the State conceded that count IX merges into count IV and that count X merges into count V, when calculating the offender score and punishment for count VIII (burglary in the first degree)

the court includes all the counts in the scoring, including the all the counts of assault in the second degree. Since counts IX and X did not merge for the purposes of scoring the burglary, their respective firearm sentencing enhancements were also required to be applied.

6. APPELLATE COSTS.

In light of recent changes to RAP 14.2 and the fact that these two young men were each sentenced to over 50 years in prison, it is extremely unlikely that the State will seek appellate costs if it prevails in this appeal.

D. CONCLUSION.

In this tragic case, the evidence showed that the defendants were so concerned about being caught that they did not take their bleeding friend to a nearby hospital or seek any medical care after he had been shot. Their dithering caused Voorhees' to bleed to death. The evidence also shows that, not content to leave after robbing and terrorizing the two victims, one of the defendants or Voorhees shot at the victims through the door.

The number and nature of criminal acts perpetrated by the defendants prevented all but two counts to merge, and none to be the same criminal conduct. The sentencing issues are largely academic because the trial court imposed a mitigated exceptional sentence in light of the lengthy sentences that resulted from the mandatory firearm and weapon enhancements.

The trial court properly applied the law and exercised its discretion in this case. The State respectfully requests that the judgments be affirmed.

DATED: March 10, 2017

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